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Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska; GINA DUNNING, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services, and CHARLES ANDREWS, M.D., Chief Medical Officer of the State of Nebraska,

Petitioners,

—v.—

LEROY H. CARHART, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE SENATOR BARBARA BOXER AND REPRESENTATIVE NITA M. LOWEY AND OTHER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT LEROY H. CARHART, M.D.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of members of the United States Congress who share a concern for the continued integrity of a woman's right to decide, without unnecessary or arbitrary governmental interference, whether to continue or terminate a pregnancy. We believe that a woman's right to decide is implicit in our Nation's concept of liberty, as guaranteed by the Constitution. As a fundamental right deeply embedded in our society, it should be insulated from shifting political winds, such as those giving rise to a new breed of legislation, commonly known by the misleading political sobriquet "partial birth" abortion bans, one example of which is now before this Court. Legislation of this type plays havoc with the constitutional principles that infuse this Court's abortion rights precedents and, if upheld, would signal a retreat from the enduring and core principles set forth in *Roe v. Wade*. As *amici* have witnessed firsthand, sponsors of "partial birth" abortion bans have strayed from constitutional guidelines in order to cultivate anti-abortion sentiment. In so doing, as the overwhelming majority of Federal courts that have considered this issue have held, they have impermissibly interfered with the liberty interest of pregnant women. Like any law that is contrary to constitutional principles, the law now before this Court must be invalidated.[2]

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[1] Pursuant to Rule 37.6 of the Supreme Court Rules, *amici curiae* disclose that no part of this brief was authored by counsel for a party in this action, nor did any person or entity make a monetary contribution to the preparation or submission of this brief. Petitioners and Respondent both consented to the filing of this brief, and letters of consent are on file with the Clerk of the Court.

[2] *Amici curiae* are listed in Appendix A.

SUMMARY OF ARGUMENT

No legislation that was seriously designed to comport with the law of the land regarding a woman's right to decide to terminate a pregnancy would attack that right in a manner that so brazenly abuses this Court's precedents. Built around a term—"partial birth" abortion—that is more a political slogan than a meaningful term of law or medicine, the Nebraska law before this Court is rife with constitutional deficiencies.

These deficiencies are deliberate. The real purpose of the Nebraska ban and others of its kind is not to regulate within the framework established by this Court's abortion rights precedents, but to pierce the core of a woman's right to choose. If bans such as Nebraska's are upheld, they will roll back the clock to the days before *Roe v. Wade* recognized that it was the woman's right, and not the State's, to make the intensely personal decision of whether to terminate a pregnancy and, by recognizing that liberty interest, allowed women to participate fully in the social and economic life of this Nation.

This Court has identified only two State interests important enough to justify restricting the liberty interest of pregnant women. One is promoting maternal health and safety; the other is protecting potential life. Neither interest is served here. Indeed, Nebraska does not even attempt to serve either interest. Without the justification of a legitimate State interest, the Nebraska ban is an unwarranted and unconstitutional intrusion into this protected realm.

The Nebraska ban also runs afoul of this Court's pronouncements regarding the critical significance of fetal viability to the constitutional framework. Before viability—and it is only pre-viability abortions that are at issue here—State regulations must not "unduly burden" a woman's right to

choose an abortion. Despite the clarity of this Court's precedent, the Nebraska ban ignores this demarcation and applies with equal force before and after viability. The result, for a woman seeking to terminate a pregnancy before viability, is an "undue burden." By banning safe procedures that are the most medically appropriate for some women, the Nebraska ban forces them to exercise their right to have an abortion before viability only if they expose themselves to a greater risk to their health.

Regardless of whether they are applied before or after viability, governmental restrictions on a woman's right to an abortion are unconstitutional unless they contain an exception for the life and health of the mother. At no stage of the pregnancy can the mother's life or health be made subordinate to that of her fetus. Yet the Nebraska ban, again in derogation of this Court's clear precedent, contains an unacceptably narrow exception to save the life of the mother, and none at all to preserve her health.

This Court ruled long ago that the difficult decision of whether to terminate a pregnancy cannot be made unilaterally by the State. The fundamental right of a woman to make this decision has been carefully balanced by this Court against State interests. The Nebraska ban drastically alters this careful balance, to the great detriment of women. As such, the District Court and Court of Appeals were correct in finding that law unconstitutional, and, we respectfully urge, should be affirmed.

I.

"PARTIAL BIRTH" ABORTION BANS STRIKE AT THE CORE PRINCIPLES OF *ROE v. WADE*

Nebraska's "partial birth" abortion ban, Neb. Rev. Stat. § 28-328(1), impermissibly, indeed dangerously, upsets the

careful balance struck by this Court between the fundamental liberty interest of pregnant women and countervailing State interests.

A. *Roe* Recognized A Constitutional Right To Choose

Personal liberty is a guarantee of the Constitution, and from that guarantee emanates a right to privacy.[3] Although not explicit in the Constitution, the right to privacy is well-recognized by this Court and deeply embedded in American society.[4] The guarantee of privacy protects rights that are "fundamental" or "implicit in the concept of ordered liberty" from arbitrary governmental interference.[5]

This Court first held almost thirty years ago, in *Roe v. Wade*, that the privacy right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 153 (1973). As *Roe* set forth, the right to choose follows from and is fully consistent with other fundamental liberty interests involving highly personal decisions about marriage, procreation, contraception, family relationships, and child rearing and education.[6] Having long recognized "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by

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[3] *See, e.g., Roe v. Wade*, 410 U.S. 113, 152 (1973).

[4] *Id. See Poe v. Ullman*, 367 U.S. 497, 543 (1961).

[5] *Roe*, 410 U.S. at 152 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

[6] *City of Akron v. Akron Center For Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983) ("The decision in Roe was based firmly on this long-recognized and essential element of personal liberty."). *See Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage).

the Due Process Clause of the Fourteenth Amendment"[7]—including freedom of personal choice in matters "so fundamentally affecting a person as the decision whether to bear or beget a child"[8]—this Court in *Roe* found that the privacy right "necessarily includes the right of a woman to decide whether or not to terminate her pregnancy."[9]

Since *Roe*, this Court has repeatedly reaffirmed the Constitution's protection of a woman's right to choose. Most prominently, *Planned Parenthood v. Casey* reaffirmed that the decision to have an abortion "fits comfortably within the framework of the Court's prior decisions" regarding "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851 and 859 (1992). This right is now ingrained in our society.

B. Only Two State Interests Justify Restricting The Right To Choose

A woman's right to choose is not absolute. It can be weighed against two "important and legitimate" State interests: the health of the pregnant woman and the potential life of the fetus. *Roe*, 410 U.S. at 162; *Casey*, 505 U.S. at 846. If neither interest is served, however, State regulation in this protected realm is unwarranted and invalid.

Moreover, even if a legitimate State interest is served, it cannot be advanced in such a way as to render the right illusory, such that "choice exists in theory but not in fact." *Casey*, 505 U.S. at 872. Since *Roe*, this Court has therefore

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[7] *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 565 (1989) (Stevens, J., concurring in part and dissenting in part).

[8] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[9] *Webster*, 492 U.S. at 565.

crafted a careful balance between the protected liberty interest of pregnant women and the countervailing interests of the State. For "logical and biological" reasons,[10] the fulcrum of this balance is viability, when a fetus attains "the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163.

The issue before this Court is the constitutionality of Nebraska's ban as applied before viability.[11] Before viability, the State interest in potential life of the fetus is not compelling.[11] The State therefore cannot attempt to protect fetal life in a manner that "imposes an undue burden" on the woman's right to terminate a nonviable fetus. *Casey*, 505 U.S. at 874. An undue burden has the purpose or effect of putting a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. Indeed, "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe*." *Id.* at 871.

Throughout pregnancy, the mother's life and health are of paramount importance and cannot be compromised by the State regardless of the interest it purports to advance. Even after viability, when the State may prohibit abortion, it may not force a woman to continue a pregnancy that threatens her life or health. Moreover, it cannot require the woman who needs an abortion to undergo a method that is less safe for her in order to further fetal interests.[13] Because the life and health of the mother are unalterably superior to the State's

[10] *Colautti v. Franklin*, 439 U.S. 379, 386 (1979) (discussing *Roe*, 410 U.S. at 163).

[11] Respondent performs the disputed procedure only before viability. *See Carhart v. Stenberg*, 192 F.3d 1142, 1146 (8th Cir. 1999); *Carhart v. Stenberg*, 972 F. Supp. 2d 507, 511 (D. Neb. 1997).

[12] *See Roe*, 410 U.S. at 163-64; *Casey*, 505 U.S. at 846, 870.

[13] *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986).

interest in the potential life she carries, abortion laws that do not contain an exception "to preserve the life or health of the mother" are unconstitutional. *Roe*, 410 U.S. at 164. *Accord Casey*, 505 U.S. at 879.

Faced with the profoundly difficult issues raised by the abortion debate, this Court, over the course of almost thirty years, has fashioned a careful balance, attuned to both individual liberty and governmental interests. This balance has preserved the essential holding of *Roe* from the shifting currents of political opinion. Today's "partial birth" abortion bans, riding the latest political current, would destroy this balance and the liberty interest it protects. Flouting precedent, bans such as Nebraska's and those debated in Congress sweep indiscriminately into this protected realm.[14] These bans ignore the critical importance of viability and subordinate maternal health in order to serve the illegitimate interest of promoting a political anti-abortion message.[15]

C. "Partial Birth" Abortion Bans Derogate *Roe*'s Essential Holding

1. The Ban Does Not Protect Fetal Life

While Nebraska may have a general interest in potential life even at the earliest stages of pregnancy, it "falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857. Before viability, therefore, abortion regulations may only "provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.* at 873. Provided they do not become a "substantial obstacle" to the woman's exercise of her right

[14] Congress has debated "partial birth" abortion bans since 1995. *See* S. 939, 104th Cong. (1995); H.R. 1833, 104th Cong. (1995); S. 6, 105th Cong. (1997); H.R. 929, 105th Cong. (1997); H.R. 1122, 105th Cong. (1997); S. 928, 106th Cong. (1999); S. 1692, 106th Cong. (1999); H.R. 3660, 106th Cong. (2000).

[15] *Webster*, 429 U.S. at 521.

to choose, "regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted." *Id.* at 877. In sum, regulations to protect a woman's pre-viable fetus must be "designed to persuade her to choose childbirth over abortion." *Id.* at 878.[16]

The Nebraska ban has nothing to do with protecting fetal life. "Partial birth" abortion bans do not express a preference for childbirth, do not attempt to dissuade a woman from choosing abortion, and do not "express profound respect for the life of the unborn." *Casey*, 505 U.S. at 877. These bans do not "provide a reasonable framework for a woman to make a decision." *Id.* at 873. The purported purpose is to deny pregnant women access to a type of broadly defined procedure, without disturbing access to other procedures that are equally effective for aborting a nonviable fetus. Unlike a waiting period or informed consent provision, banning a procedure that lawmakers find offensive cannot be justified as a "structural mechanism" designed to promote childbirth or discourage abortion. Indeed, contrary to the parameters set forth in *Casey*, the Nebraska ban provides no means for the State to inform the woman's choice or otherwise contribute anything to her decision-making process—other than possible intimidation of women and their physicians. *See Casey*, 505 U.S. at 877 ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's choice, not hinder it."); *Hope Clinic v. Ryan*, 195 F.3d 857, 878 (7th Cir. 1999) (Posner, C.J., dissenting) (criticizing "partial birth" abortion bans that do not attempt to inform women but are likely to intimidate physicians).

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[16] Regulations upheld on this basis include waiting periods, informed consent, recordkeeping and reporting, and parental consent provisions. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

Because the ban does not further Nebraska's interest in pre-viable life, its intrusion on the liberty interest of pregnant women cannot be justified on that basis.[17]

2. The Ban Does Not Promote Maternal Health

The second State interest important enough to justify regulating the right to choose is the health and safety of the woman seeking an abortion. *See Casey*, 505 U.S. at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."). This interest has been found to justify regulations regarding the qualifications and licensure of the person performing the abortion,[18] the licensure and type of facility where it is performed,[19] and recordkeeping.[20] No such interest is furthered by the Nebraska ban.

Nebraska does not even purport to promote maternal health or safety, nor could it, even if its ban only applied to the D&X procedure.[21] The D&X procedure was found by the trial court to be safer than other alternatives, including the most common alternative, the D&E procedure.[22] Of course, the Nebraska ban is no more justifiable if, given the most reasonable interpretation of "partial birth abortion," it is read to bar the D&E procedure as well.[23]

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[17] Nebraska already bans post-viability abortions. Neb. Rev. Stat. §§ 28-329, 332.

[18] *E.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997).

[19] *E.g.*, *Roe*, 410 U.S. at 163.

[20] *E.g.*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 81 (1976).

[21] The term "D&E" when used herein refers to an abortion procedure known as "dilation and evacuation." The term "D&X" refers to a type of D&E abortion known as "dilation and extraction."

[22] The trial court's finding, *Carhart*, 972 F. Supp. at 525-27, was affirmed by the Court of Appeals at *Carhart*, 192 F.3d at 1146.

(footnote 23 appears on following page)

3. The Ban Lacks A Maternal Health Exception

A State can advance its interest in a viable fetus by regulating or even proscribing abortion, but only if an exception is made "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65. *Accord Casey*, 505 U.S. at 846. Although it is a bedrock of this Court's abortion rights jurisprudence, maternal health is ignored by the Nebraska ban. *See Colautti*, 439 U.S. at 400 (invalidating for vagueness provision that failed to "clearly specify . . . that the woman's life and health must always prevail over the fetus' life and health when they conflict" and that raised "[s]erious ethical and constitutional difficulties" by failing clearly to inform a physician "to consider his duty to the patient to be paramount to his duty to the fetus"); *Thornburgh*, 476 U.S. at 771 (striking regulation that "evince[d] no intent to protect a woman whose life may be at risk").

Nebraska's narrow exception "to preserve the life of the mother" offers no protection against threats to maternal health. It is interesting to note that even in its pre-existing statute proscribing abortions after viability, when the state interest is at it peak, Nebraska's legislature did include the constitutionally required maternal health exception. Neb. Rev. Stat. §§ 28-329, 330. Omitting the same exception from the present ban, which amounts to a statement that a mother's health is less important to the State than that of a nonviable fetus, disregards the plain law of the land.[24] By taking

[23] *Hope Clinic*, 195 F.3d at 878 ("But as banning 'partial birth' abortions is not intended to improve the health of women (or anyone else for that matter), it cannot be defended as a health regulation.") (Posner, C.J., dissenting).

[24] Some advocates of "partial birth" abortion bans argue that a maternal health exception would be abused by physicians who interpret it too broadly. *See* 144 Cong. Rec. H6209 (July 23, 1998) (statement of Rep. Hyde). This argument is flawed for at least five reasons. First, it is hypocritical, coming as it does from the same advocates who, in other aspects of the abortion debate, rely upon and trust the judgment of physicians. *See* 144 Cong. Rec. H6198 (July 23, 1998) (statement of Rep. Smith regarding letter from AMA to Sen. Santorum). Second, it is "founded on suspicion . . . discloses a lack of confidence in the integrity of physicians . . . [and] is necessarily degrading to the conscientious physician, particularly the obstetrician . . . ." *Bolton*, 410 U.S. at 196. Third, by licensing physicians, the State recognizes them to be "capable of exercising acceptable clinical judgment," and for those who do not, other forms of State censure are readily available. *Id.* at 199. Fourth, this argument does nothing to excuse the failure to follow the clear precedent of this Court. Fifth, Nebraska, like many states, provides a health exception to its post-viability abortion ban, as well as latitude to the physician to choose the method of post-viability abortion most protective of the woman's life *and* health. Neb. Rev. Stat. §§ 28-329-32.

unnecessary chances with the mother's health, Nebraska puts a "substantial obstacle" in the path of a woman seeking to terminate her pregnancy.

D. Partial Birth Abortion Bans Undermine The Rule of Law, To The Great Detriment of Women and Society

The doctrine of stare decisis, which requires adherence to sound judicial precedent, is indispensable to our constitutional form of government.[25] Adherence to precedent gives meaning to the rule of law and protects against arbitrary governance.[26] It furthermore protects a citizenry that relies upon precedent to order their lives.[27]

[25] *See Hilton v. South Carolina Pub. Rs. Comm'n*, 502 U.S. 197 (1991); Powell, *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16; Cardozo, *The Nature of the Judicial Process*, 149 (1921) (both cited in *Casey*, 505 U.S. at 854).

[26] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987); *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

[27] *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970); *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part).

Eight years after *Casey* was decided, there is still "no evolution of legal principle [that] has left *Roe*'s doctrinal footings weaker than they were in 1973." *Casey*, 505 U.S. at 857. The central holding of *Roe*, the right of a woman to terminate her pregnancy before viability, remains a highly workable rule well-rooted in our constitutional and social firmament, its soundness relied upon by millions of American women. As such, the doctrine of stare decisis compels that *Roe*'s central holding not be disturbed.

The purpose behind the stare decisis doctrine is "especially compelling" in a case of the constitutional magnitude of *Roe*.[28] On only two occasions in its history has this Court "responded to national controversies" of comparable magnitude by reversing course and stating a new rule of law.[29] *Casey*, 505 U.S. at 861. Both decisions were predicated on a fundamental change in the facts and circumstances upon which the rejected precedent was based. *West Coast Hotel* rejected the theory of laissez-faire economics embraced in *Lochner v. New York*[30] because it "seemed unmistakable to most people" that that theory rested on "fundamentally false factual assumptions." *Id.* at 861-62. *Brown v. Board of Education* rejected the "separate but equal" rule of *Plessy v. Ferguson*[31] because "[s]ociety's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896." *Id.* at 863.

Contrary to the circumstances underlying *West Coast Hotel and Brown*, the facts underlying *Roe*'s essential holding are no different today than they were in 1973, and the

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28 *Akron*, 462 U.S. 416, 420 n.1 (1983).

29 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Brown v. Board of Education*, 347 U.S. 483 (1954).

30 198 U.S. 45 (1905).

31 163 U.S. 537 (1896).

Court's "explanation for its decision" no less sound. *Casey*, 505 U.S. at 863. The wisdom of preventing the disenfranchisement of women from modern American society by recognizing their liberty interest in deciding for themselves whether to continue a pregnancy is, if anything, more evident and more compelling today than it was in 1973.[32] While laissez-faire economic theory, by the time of *Lochner*, was "recognized everywhere outside the Court to be dead,"[33] the idea that the equal participation of women in our economic and social life is for the good of the Nation is alive and well. The finding adopted by this Court in 1992 that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856, is no less vital today.

To directly compromise, if not neutralize, that right in the manner intended by bans such as Nebraska's would not, as in *Brown*, confirm what American society has already recognized, but rather refute it, sending an incomprehensible and disruptive message about the rule of law and the role of women in our society.[34] For millions of Americans who have come to rely on the liberty interest recognized in *Roe* and undisturbed in at least twenty subsequent abortion rights rulings of this Court,[35] to now pierce its heart by upholding such unprincipled restrictions would exact a "terrible cost"

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32 *See Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) (noting that the respect for precedent mandated by stare decisis demonstrates "the wisdom of this Court as an institution transcending the moment").

33 *Casey* 505 U.S. at 862 (quoting Justice Jackson, The Struggle for Judicial Supremacy, at 85 (1941)).

34 *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (deploring our Nation's "long and unfortunate history of sex discrimination").

35 *See* Appendix B.

and cause "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869.

II.

"PARTIAL BIRTH" ABORTION BANS UNDULY BURDEN THE RIGHT TO CHOOSE

A. "Partial Birth" Abortion Bans Create A "Significant Obstacle" For A Woman and Her Physician

1. Bans of Particular Pre-viability Procedures Have Never Been Upheld By This Court

To further its interest in maternal health, the State may, for example, regulate who performs the abortion procedure and in what kind of facility. To further its interest in potential life, the State may express its preference for childbirth. But this Court has not been willing to approve bans or restrictions on the performance of particular abortion procedures, finding that such regulations are not adequately related to either legitimate State interest. In each of three cases since *Roe* in which this Court reviewed regulation of particular procedures, the regulation was invalidated.

In *Planned Parenthood of Central Missouri v. Danforth*,[36] several provisions of a Missouri abortion law were reviewed, including one which banned the use of saline amniocentesis as an abortion procedure. The ban was challenged on the grounds that saline amniocentesis was not only the most common form of abortion after the first trimester but it was safer than the readily available alternatives. This Court agreed and invalidated the ban for several reasons.

First, it was important to "recognize the prevalence" of saline amniocentesis "as an accepted medical procedure in

[36] 428 U.S. 52 (1976).

this country." *Danforth*, 428 U.S. at 77. In addition, a broad "outright legislative prescription" had the effect of deterring development of other safe and effective methods. *Id.* Most importantly, the ban "force[d] a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Id.* at 79.[37]

Because the Nebraska ban, like other "partial birth" abortion bans, will have the practical effect of banning both D&X and D&E procedures, the latter being the most common second trimester technique in the United States today, and because the remaining alternatives will be less safe for the mother than those outlawed, it, too, is an unreasonable and arbitrary regulation that should be invalidated.

Colautti v. Franklin[38] addressed the constitutionality of a Pennsylvania regulation that restricted physician discretion by providing that "the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother." *Colautti*, 439 U.S. at 397. The record indicated that available techniques for maximizing fetal survival all "involved disadvantages from the perspective of the woman." *Id.* at 398. Then, as now, there was "disagreement among medical authorities about the relative merits and safety of different abortion procedures that may be used during the second trimester." *Id.* at 399. The regulation was declared unconstitutionally vague because it did not clearly allow the physician to put the life and health of the mother first, but instead left the door open to a "trade-off" between

[37] The wisdom, in this case as in *Danforth*, of preventing legislative bans from chilling medical progress is proven by the fact that saline amniocentesis abortion is now nearly non-existent, as safer methods have been allowed to develop. *See* II.A.4, *infra*.

[38] 439 U.S. 379 (1979).

maternal and fetal health that raised "serious ethical and constitutional difficulties." *Id.* at 400.

The regulation reviewed in *Thornburgh v. American College of Obstetricians and Gynecologists*[39] required physicians, after viability, to use the procedure most likely to preserve the life of the fetus unless doing so presented "significantly greater risk" to the life or health of the mother. *Thornburgh*, 476 U.S. at 747. The Court of Appeals for the Third Circuit had found that this provision forced an unconstitutional "trade-off" between maternal and fetal health. This Court affirmed, agreeing that the provision was "not susceptible to a construction that does not require the mother to bear an increased risk in order to save her viable fetus." *Id.* at 769.

The same deficiencies that rendered these provisions unconstitutional are manifest here. The Nebraska ban forces a "trade-off" of an even less rational sort, one in which the health of the mother is subordinated not for the sake of potential life, but for the sake of a judgment by the Nebraska legislature that one medical technique is less "moral" than another. As discussed below, the Nebraska ban also dangerously interferes with a physician's exercise of medical judgment. The result is a regulation that unconstitutionally burdens the right to choose.

2. These Bans Supplant Physicians' Best Medical Judgment

By regulating a liberty interest solely to express a moral judgment, Nebraska has intruded without justification into a realm of fundamental privacy protected by the Constitution. By banning a safe pre-viability abortion procedure, it has also unduly burdened that liberty interest. Preventing physicians from recommending what for some women would be the most *medically* appropriate procedure (regardless of

[39] 476 U.S. 747 (1986).

what Nebraska's legislators feel is most *morally* appropriate), puts a substantial obstacle in the path of a woman who decides to terminate her pregnancy before viability.

Deciding *whether* to have an abortion raises complex medical, social, familial, moral and religious questions. Deciding *how* to perform an abortion is primarily a medical question. This Court has repeatedly and unequivocally recognized how important it is to keep medical judgment, knowledge and skill free from unnecessary regulation.[40] Indeed, the right to choose recognized in *Roe* "vindicate[d] the right of the physician to administer medical treatment according to his professional judgment up to the point where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." *Roe*, 410 U.S. at 165-66. Almost twenty years later, in *Casey*, this Court's recognition of the importance of safeguarding medical judgment from State impairment remained undiminished. There, for example, Pennsylvania's informed consent provision was upheld because it "d[id] not prevent the physician from exercising his or her medical judgment." *Casey*, 505 U.S. at 884.[41] From *Roe* to *Casey*, this Court has closely guarded against the potential for unnecessary State interference with a physician's judgment and ability most

[40] *See, e.g., Roe*, 410 U.S. at 165; *Danforth*, 428 U.S. at 61; *Thornburgh*, 476 U.S. at 764; *Casey*, 505 U.S. at 883-84; *Colautti*, 439 U.S. at 387 (*Roe* and *Bolton* "underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment.").

[41] Even *Casey*'s approval of Pennsylvania's informed consent statute was tethered to that statute's recognition that the physician could tailor the required information where doing so was necessary to avert "serious adverse" consequences to the woman's health. *Casey*, 505 U.S. at 883-84.

safely to administer health care to women, particularly in performing pre-viability abortions.[42]

In *Doe v. Bolton*, for example, a regulation requiring the approval of a hospital committee before an abortion was performed was invalidated because "the woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited." 410 U.S. 179, 197 (1973). The Court found that

> medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Id. at 192.

The State also may consider these factors, in addition to "the physical safety of a particular procedure," when crafting health regulations.[43] But that is not the purpose or effect of the Nebraska ban. Nebraska forbids a physician, directly responsible for preserving the pregnant woman's well-being

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[42] "The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' " *Akron*, 462 U.S. at 427 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973), and citing *Whalen v. Roe*, 429 U.S. 589, 604-05 n.33 (1977)). *See Colautti*, 439 U.S. at 387 (discussing importance of adequate physician discretion); *Danforth*, 428 U.S. at 67 n.8 (warning against "confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession").

[43] *See Akron*, 462 U.S. at 467 (O'Connor, J., dissenting).

and intimately involved in her right to choose, from offering her the pre-viability abortion procedure that carries the least risk to her health. *See Casey*, 505 U.S. at 895 ("The effect of state regulation of a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of family but upon the very bodily integrity of the pregnant woman.").[44] And the loss of the physician's judgment and attendant sacrifice of maternal safety is not offset by any legitimate gain for Nebraska, as there is no indication that any of the "health" factors that should inform a State's regulation in this area were even considered, much less served, by the Nebraska ban.

Perhaps it is because so much of their reasoning relies on the erroneous assumption that so-called "partial birth" abortion is *never* the safest pre-viability alternative, that advocates of such bans are willing to risk substituting their judgment for that of the attending physician *in every case*.[45] And yet, determining which procedure is safest for any particular woman 16 to 20 weeks pregnant is at least as complicated and individualized a medical question as determining when any particular fetus is viable, a question this Court has always held should be answered by the physician, not pre-ordained by the State.[46] The real risk here, of course,

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[44] *And see Casey*, 505 U.S. at 857 (discussing *Roe* as a rule of "personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection," and citing, among other cases, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990).

[45] *See, e.g.*, 144 Cong. Rec. S.10511 (Sept. 17, 1998) (statement of Sen. Domenici) and S.10481 (statement of Sen. Faircloth).

[46] *See, e.g., Danforth*, 439 U.S. at 388-89. ("[W]e observed in *Roe* that viability is a matter of medical judgment, skill and technical ability, and . . . it is not the proper function of the legislature or courts to place viability, which essentially is a medical concept, at a specific point.")

is borne by the woman whose decision to terminate a nonviable fetus can only be effectuated if she subjects herself to a procedure that may be more dangerous to her life or health than the one outlawed. Regardless of how many or how few women are put at risk, replacing a physician's case-by-case judgment with a sweeping moral pronouncement is unduly burdensome. *See Casey*, 505 U.S. at 894 ("the proper focus is on the group for whom the law is a restriction, not the group for whom it is irrelevant"). *Accord Carhart*, 972 F. Supp. at 530 ("[F]or women who die or suffer serious complications because they cannot have the safest available procedure to abort their nonviable fetuses, the increased risk cannot be honestly considered insignificant.").

3. These Bans Make Exercising The Right To Choose More Dangerous

The right to choose has two identifiable components: deciding whether or not to have an abortion and, if made, implementing the decision to have an abortion.[47] After a decision to end a pre-viable pregnancy has been made, and the State's legitimate efforts, if any, to encourage childbirth have failed, "partial birth" abortion bans illegitimately interfere with the exercise of that choice by denying the woman, and her physician, access to what may be the safest and most medically appropriate procedure.

[47] *See Roe*, 410 U.S. at 164 (discussing "the abortion decision and its effectuation"); *Bolton*, 410 U.S. at 197 (discussing "[t]he woman's right to receive medical care . . . and the physician's right to administer it"); *Colautti*, 439 U.S. at 387 (discussing physician's central role "both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion [is] to be carried out"); *Akron*, 462 U.S. at 427 (discussing "full vindication of the woman's right" as necessitating exercise of medical judgment in "both assisting the woman in the decision making process and implementing her decision should she choose abortion").

Rather than create "a structural mechanism" that favors child birth, bans like Nebraska's effectively penalize the woman who decides against childbirth. The effect is an undue burden—a substantial obstacle placed by the State between the woman's decision and her ability to act most safely on that decision.[48]

As reaffirmed in *Casey*, part of *Roe*'s "essential holding" is "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846 (emphasis added). Thus, other than by the kind of governmental influence sanctioned in *Casey* (*e.g.*, "legislation aimed at ensuring a decision that is mature and informed," *id.* at 883), once a woman makes a decision to terminate a pre-viable fetus, that decision "may be effectuated by an abortion free of interference by the State." *Roe*, 410 U.S. at 163. *See Colautti*, 439 U.S. at 386 ("[P]rior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy."). True, *Roe*'s "essential holding implies no limitation of the authority of

[48] There can be no doubt, based on the record before this Court, that the D&X procedure performed by Respondent is the safest for some women. The District Court so found on two occasions: in granting a preliminary injunction against the Nebraska ban, and after a full trial on the merits, in granting a permanent injunction. These findings of fact were not disturbed by the Court of Appeals.

Among the risks to maternal life and health that Respondent avoids by performing the D&X procedure are: (1) longer operating time; (2) greater blood loss and infection; (3) complications from bony fragments; (4) instrument-inflicted damage to the uterus and cervix; (5) exposure to the most common causes of maternal mortality (DIC and amniotic fluid embolus); [and] (6) "horrible complications" arising from retained fetal parts. *Carhart v. Stenberg*, 11 F. Supp. 2d. 1099, 1127 (D. Neb. 1998) ("These are substantial obstacles within the meaning of *Casey*."). The vast majority of lower courts agree that the D&X procedure has significant health and safety benefits. *See Hope Clinic*, 195 F.3d at 883 (collecting cases).

the State to make a value judgment favoring childbirth over abortion," *Maher*, 432 U.S. at 474, but if a pregnant woman rejects that State-sponsored value judgment, and opts instead to end her pregnancy before viability, *Roe* and *Casey* limit the authority of the State to put new and additional obstacles in her path, such as the denial of a safe and medically appropriate means of effectuating her decision.

4. "Partial Birth" Abortion Bans Will Also Impede Medical Progress

Since *Roe*, this Court has kept a watchful eye on medical advances when balancing State interests against personal liberty. Indeed, the shift from *Roe's* trimester framework to *Casey's* more fluid viability standard reflected a judicial appreciation of medical progress. *See Casey*, 505 U.S. at 860. In stark contrast, Nebraska's ban and others like it ignore the importance of advances in medicine, to the detriment of both this Court's careful constitutional balancing and the health of pregnant women.

The procedures targeted by the Nebraska ban play an important and evolving role in second trimester abortions.[49] Medical advances in these and other techniques have made it safer for women who choose to end their pregnancies at this stage. Such advances should be encouraged, not stymied by sweeping prohibitions. *See Danforth*, 428 U.S. at 78 (striking provision banning particular procedure because, in part, ban appeared to sweep in procedures "that may be developed in the future and may prove highly effective and completely safe"); *Colautti*, 439 U.S. at 387 ("We thus have left the point [of viability] flexible for anticipated advancements in medical skill."). Because the Nebraska ban criminalizes a broad and vaguely defined class of medical procedures, it will have a particularly chilling effect on

[49] *Carhart*, 972 F. Supp. at 515-16, 525-27 (discussing D&E and D&X procedures).

physicians who will steer well clear of its proscriptions in order to avoid being prosecuted as criminals. *See Hope Clinic*, 195 F.3d at 889 (noting the "*in terrorem* effect" of "partial birth" abortion).

The harm to women is therefore twofold: access to a safe procedure today is denied and the likelihood of developing an even safer procedure tomorrow is diminished.

B. "Partial Birth" Abortion Bans Sacrifice Constitutional Principle To Political Expediency

1. The Political History Of Such Bans Belies Their True Purpose

As shown above, the effect of "partial birth" abortion bans such as Nebraska's and those passed by Congress but vetoed by the President would be to overturn several core principles of *Roe v. Wade*, rendering a woman's constitutional right to choose virtually meaningless. But it is also quite clear that such a result is exactly what the sponsors of such bans intend. Although they now contend that "partial birth" bans are designed to outlaw only the D&X procedure (which even so construed would violate this Court's precedents), the political history of these bans reveal a far broader agenda.

The *amicus* brief submitted on behalf of Petitioners by members of Congress ("Petitioners' Congressional Brief"), such as Representatives Hyde and Canady, claims that the Nebraska ban targets the D&X procedure only. Such representations are contrary to the plain language of the Nebraska ban, prior statements made by many of these same legislators, and prior claims by brief's author, James Bopp, Jr.

For example, Mr. Canady, through Petitioners' Congressional Brief, now represents that "[t]he history of congressional efforts to ban PBA ["partial birth" abortion] shows that only a new procedure was targeted . . . known as intact dilation and extraction ("intact D&X")—not conventional

abortion methods." Petitioners' Congressional Brief at 1. This new claim reverses his prior position. In 1996, in a letter to House members that attempted to muster anti-abortion sentiment for a then-pending federal ban on "partial birth" abortions, Mr. Canady declared that

> H.R. 1833 [The 1995 Partial-Birth Abortion Ban Act] *does not ban "D&X"* or "brain suction" abortions. H.R. 1833 bans *any* "abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[50]

Similarly, during debate in 1997 concerning another pending "partial birth" abortion ban, H.R. 1122, Representative Hyde, speaking in favor of the bill, unleased the following broadside against *Roe v. Wade*, in which he accused this Court of "strip-mining" the Constitution.

> This great trajectory in our national experience, that of inclusion, has been shattered by *Roe v. Wade* and its progeny. By denying an entire class of human beings the protection of the laws, we have betrayed the best in our tradition. We have also put at risk every life which someone, some day, somehow might find inconvenient.
>
> . . .
>
> We cannot today repair all the damage done to our culture by *Roe v. Wade*. We cannot undo the injustice that has been done to 35 million tiny members of the human family who have been summarily killed since the Supreme Court, strip-mining the Constitution, discovered therein a fundamental right to abortion. . . .[51]

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[50] Letter from Rep. Canady, dated March 18, 1996 at Supp. Appendix Exh. 31 (emphasis added)

[51] 143 Cong. Rec. H1220 (March 20, 1997) (Statement of Rep. Hyde). In Senate debate, supporters of the ban also spoke of it in terms of undoing the "horrendous rule" of *Roe v. Wade*. *See* 144 Cong. Rec. S.10492 (Sept. 17, 1998) ("[O]ne of the most tragic and saddest days in our nation's history was the day the Supreme Court ruled in *Roe v. Wade* that unborn babies can legally be killed by their mothers. Each of us who has fought, heart and soul, to undo that damaging decision, understood so well on January 22, 1973, that we had yet to see what devastation would come of such a horrendous rule.") (statement of Sen. Helms).

Finally, James Bopp, Jr. is both the author of the Petitioners' Congressional Brief and the author of 1998 article on "partial birth" abortions. Petitioners' Congressional Brief draws heavily from the article, yet steers clear of statements therein in which Mr. Bopp states that the term "partial birth" abortion does not mean what Petitioner now says it means. When writing for this Court, Mr. Bopp claims that D&X is the "targeted procedure" of "partial birth" abortion bans, but when cultivating anti-*Roe* sentiment in his article, he acknowledges that "partial birth" abortion "has a clear legislative definition making it unique from intact D&E, intact D&X (the ACOG definition), and other procedures."[52]

In addition, the Nebraska ban, like its federal counterparts, invites prosecutors to set their targets beyond the D&X procedure. Predicated as they are on the vague and medically meaningless term "partial birth" abortion, such legislation is inherently suspect.[53] Yet efforts to define this term were rebuffed, since clarifying these statutes would have made it more difficult to use them as proxies for the right to choose in general, and more difficult to stir "anti-abortion fervor" through misleading characterizations of the D&X proce-

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[52] James Bopp, Jr., *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 Issues L. & Med. 3, 6 (1998).

[53] *See Carhart*, 11 F. Supp. 2d at 1131 ("The legislature elected to use nonmedical terms to describe surgical techniques and it must bear the consequences of that decision."). *Accord Carhart*, 192 F.3d at 1145 (finding that the term has "no fixed medical or legal content").

dure.[54] Vagueness, and the elasticity it offers for attacking the heart of *Roe* from various angles, are preferred.[55]

Nebraska's ban and its federal analogues suffer from grave and obvious constitutional infirmities beyond vagueness and overbreadth. Most striking, and in direct defiance of this Court's abortion rights decisions, is the lack of a maternal health exception. Another glaring deficiency is the failure to respect this Court's foundational distinction between pre-viability and post-viability abortions. The motivation behind such tactics is clear: sponsors of these bans will not allow principle or precedent to interfere with their attack of *Roe*.

Tellingly, these infirmities could have been readily cured by amendment. And although an amendment recognizing the viability distinction and providing a maternal health exception was offered in Congress, the House majority refused to allow the amendment to be debated on the floor.[56] Again, the message is clear: only legislation aimed at the heart of *Roe v. Wade* will suffice. In sum, the "peculiar and questionable character"[57] of such bans is symptomatic of an agenda other than what is presently represented to this Court and other than what this Court's precedents require.

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54 *Hope Clinic*, 195 F.3d at 879-80 (Posner, C.J., dissenting).

55 *See Id.* at 879 (Posner, C.J., dissenting) ("[T]here is no meaningful difference between the forbidden and the privileged practice. . . . We should consider therefore why any state would pass such a law.").

56 *See* H.R. 1032, 105th Cong. (1997) (the Hoyer-Greenwood amendment).

57 *Hope Clinic*, 195 F.3d at 878 (Posner, C.J., dissenting).

2. The Liberty Interest Of Pregnant Women Does Not Stop At The Cervix

Faced with the transparency of trying to pass off these bans as something that they are not, Representatives Hyde, Canady and others retreat to what is, if anything, an even less plausible argument. Since the constitutional principles of *Roe v. Wade* and the political purposes of such bans cannot co-exist, this alternative argument posits that *Roe* is not at issue at all, much less at stake. *Roe*, this argument goes, is about the "unborn," whereas this legislation is about the "partially born." Petitioners' Congressional Brief at 20.[58]

Petitioners' congressional *amici* urge that *Roe* is inapplicable to "partial birth" abortions because *Roe* only protects fetuses that are entirely within the uterus, not those which may have begun to move into the vagina. This Court, however, has never gerrymandered a woman's anatomy into different zones with different levels of constitutional protection. *Roe*'s protections do not end at the cervical os.

This Court's precedents are therefore not susceptible to Petitioners' strained interpretation. The essential holding of *Roe*, reaffirmed in *Casey*, is that a woman has a right—one that is particularly resistant to State interference before viability—to determine whether to continue or terminate a pregnancy. *See Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe* [and] a rule of law and a component of liberty we cannot renounce."). The D&X procedure is a safe means of effectuating a choice that every woman has a right

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58 The Court of Appeals dismissed this argument as "unavailing." *Carhart*, 192 F.3d at 1151. Representatives Canady, *et al.*, base this argument in part on a regulation of the Texas Code that was not before the Court in *Roe v. Wade*. Yet Petitioner somehow extrapolates that this Court not only upheld the constitutionality of the regulation, but created a two-tiered analysis with different results for fetuses which are "unborn" and those which are "partially born."

to make. At the very least, bans like Nebraska's restrict a woman's ability to exercise her liberty and thus directly implicate *Roe*. Furthermore, the right to abortion has been expressed by this Court in terms of a careful balance between individual liberty and State interest. Because "partial birth" bans fundamentally disrupt that balance, those precedents are at issue. And when the core concepts of viability and maternal health are compromised, revisiting the essential holding of *Roe* is inevitable. Thus, in addition to a lack of common sense, the "legal" argument put forward by Petitioners' congressional *amici* lacks any support in the law and should, we respectfully submit, be rejected.

CONCLUSION

Bans such as Nebraska's defy this Court's abortion rights jurisprudence. They serve no legitimate State interest, they compromise maternal health, and they apply indiscriminately to pre- and post-viability procedures alike. Such bans sacrifice constitutional principles to political opportunism, disturbing not only the careful balance wrought by this Court over almost thirty years, but the ability of women to participate fully in the social and economic life of the country. Rooted as it is in a fundamental privacy right guaranteed by the Constitution, the liberty interest of pregnant women should not, indeed must not, be so cavalierly undone. For these and all the reasons stated above, *amici curiae* respectfully submit that the decision of the Court of Appeals to invalidate the Nebraska ban be affirmed.

Respectfully Submitted,

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APPENDICES

Appendix A

AMICI CURIAE—MEMBERS OF CONGRESS

Rep. Neil Abercrombie
Rep. Gary L. Ackerman
Rep. Thomas H. Allen
Rep. Robert E. Andrews
Rep. Brian Baird
Rep. John E. Baldacci
Rep. Tammy Baldwin
Rep. Robert A. Brady
Rep. Xavier Becerra
Rep. Shelley Berkley
Rep. Howard L. Berman
Sen. Barbara Boxer
Rep. Rich Boucher
Rep. Michael E. Capuano
Rep. Julia M. Carson
Rep. John Conyers, Jr.
Rep. Danny K. Davis
Rep. Peter DeFazio
Rep. Diana DeGette
Rep. Rosa DeLauro
Rep. Peter Deutsch
Rep. Lloyd Doggett
Rep. Julian C. Dixon
Rep. Eliot L. Engel
Rep. Anna Eshoo
Rep. Sam Farr
Rep. Chaka Fattah
Sen. Dianne Feinstein
Rep. Bob Filner
Rep. Martin Frost
Rep. Maurice D. Hinchey
Rep. Joseph M. Hoeffel
Rep. Rush Holt
Rep. Steve Horn
Sen. Daniel Inouye
Sen. James M. Jeffords
Rep. Jesse Jackson, Jr.
Rep. Eddie Bernice Johnson
Rep. Nancy Johnson
Rep. Tom Lantos
Sen. Frank Lautenberg
Rep. Barbara Lee
Rep. Sheila Jackson Lee
Sen. Carl Levin
Rep. Zoe Lofgren
Rep. Nita M. Lowey
Rep. Carolyn Maloney
Rep. Robert T. Matsui
Rep. James P. McGovern
Rep. Cynthia McKinney
Rep. Martin T. Meehan
Rep. Juanita Millender-McDonald
Rep. Gregory W. Meeks
Rep. Constance Morella
Sen. Patty Murray
Rep. Jerrold Nadler
Rep. Eleanor Holmes Norton
Rep. John W. Olver
Rep. Major R. Owens
Rep. Donald M. Payne
Rep. Frank Pallone, Jr.
Rep. Nancy Pelosi
Rep. David E. Price

Rep. Martin Olav Sabo
Rep. Loretta Sanchez
Rep. Bernard Sanders
Rep. Janice D. Schakowsky
Sen. Charles E. Schumer
Rep. Louise M. Slaughter
Sen. Olympia Snowe
Rep. Pete Stark
Rep. Mike Thompson
Rep. John F. Tierney
Rep. Edolphus Towns
Rep. Mark Udall
Rep. Nydia M. Velazquez
Rep. Henry A. Waxman
Rep. Anthony D. Weiner
Rep. Lynn C. Woolsey
Rep. Albert R. Wynn

Appendix B

Connecticut v. Menillo, 423 U.S. 9 (1975); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Center for Reproductive Health*, 462 U.S. 416 (1990); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Mazurek v. Armstrong*, 520 U.S. 968 (1997).